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Sixth report on reservations to treaties

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I. Introduction

1. As an introduction to his sixth report, the Special Rapporteur deems it useful to present, as he did in his previous reports,

- A brief summary of the lessons which in his view can be drawn from the consideration of his preceding report both by the Commission itself and by the Sixth Committee of the General Assembly;
- A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention;
- A general presentation of this report.

A. Outcome of the fifth report

1. Object of the fifth report

2. The fifth report on reservations to treaties,[1] which essentially replaced the fourth report,[2] comprised, in addition to a general introduction drafted along the same lines as the one in this report, a Part One on alternatives to reservations and interpretative declarations[3] and a Part Two dealing with the procedure regarding reservations and interpretative declarations.[4]

3. The Special Rapporteur, who had hoped to dispose of these procedural issues in his fifth report, had planned to deal in two separate chapters with the formulation, modification and withdrawal of reservations and with the formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations. In addition, he had planned to present a general overview of the effects of reservations, acceptances and objections.[5]

4. Regrettably, the Special Rapporteur is compelled to admit that he had somewhat overestimated his capabilities; it proved impossible for him to deliver in time for translation not only the parts of his report dealing with the effects of reservations, but also the entire chapter on the reactions of other parties to reservations and interpretative declarations made by a State or an international organization, and even the end of the chapter dealing with the procedure for formulating reservations and interpretative declarations.

5. Nevertheless, this failing, for which the Special Rapporteur bears sole responsibility, has not had any consequences, since the Commission was unable to consider the fifth report, as presented to it, in its entirety.

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[1] A/CN.4/508 and Add.1-5.

[2] On this subject, see paras. 21 and 59 of the fifth report (A/CN.4/508).

[3] A/CN.4/508/Add.1, paras. 66-213. See also A/CN.4/508/Add.2, containing the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report.

[4] A/CN.4/508/Add.3-4, paras. 214-332.

[5] See A/CN.4/508, paras. 63-65.

2. Consideration of the fifth report by the Commission

6. During its fifty-second session, at its meetings held on 31 May and 2, 6 and 7 June 2000, the Commission considered Part One of the fifth report on alternatives to reservations. Upon the conclusion of this consideration, it sent the draft guidelines proposed on this topic by the Special Rapporteur to the Drafting Committee, which considered and amended them at its meetings held from 6 to 8 June 2000.[6]

7. At its 2640th meeting on 14 July 2000, the Commission adopted on first reading draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations) and 1.7.2 (Alternatives to interpretative declarations). This concluded, at least provisionally,[7] the adoption of Part One of the Guide to Practice in respect of reservations to treaties.[8]

8. The commentaries on the new draft guidelines were adopted by the Commission at its 2659th and 2660th meetings on 15 and 16 August 2000. They are contained in the report of the Commission on the work of its fifty-second session.[9]

9. The Special Rapporteur presented Part Two of his fifth report to the Commission at the 2651st meeting. A summary of this presentation can be found in the report of the Commission.[10]

10. Owing to lack of time, the Commission was unable either to consider this part of the fifth report or, consequently, to transmit the 14 draft guidelines contained therein to the Drafting Committee. It will need to do so during its fifty-third session.

3. Consideration of chapter VII of the report of the Commission by the Sixth Committee

11. Chapter VII of the report of the Commission on the work of its fifty-second session deals with reservations to treaties. This report was considered by the Sixth Committee of the General Assembly from 23 October to 3 November 2000.[11]

12. Generally speaking, the part of the report of the Commission that dealt with reservations to treaties was well received by the States whose representatives made statements in the Sixth Committee on this topic. All of them reaffirmed their interest

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[6] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), paras. 635-636.

[7] It is not precluded that in the course of its further work, the Commission may find it necessary to add to Part One of the Guide to Practice in respect of reservations to treaties, if it believes that some additional clarifications might prove useful.

[8] For the full text of this part, see *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 662.

[9] Ibid., para. 663.

[10] Ibid., paras. 639-660.

[11] See the summary records of the 14th to 24th meetings, A/C.6/55/SR.14-SR.24; see also the very useful topical summary of the discussions prepared by the secretariat, A/CN.4/513, paras. 283-312. To his great regret, when drafting his report, the Special Rapporteur had at his disposal only the English version of the summary records of the debate in the Sixth Committee, with two exceptions; while paying tribute to the outstanding work of the secretariat, he wishes to draw its attention to the fact that French is also an official working language of the General Assembly and the Commission.

in the Guide to Practice[12] and most of them welcomed the additional clarifications on the nature of ambiguous unilateral declarations[13] and the efforts made by the Commission to specify the possible alternatives to reservations.[14]

13. Nevertheless, several delegations again made known their impatience to see the Commission address the crux of the issue, namely, the legal effects of reservations — whether lawful or unlawful — and the objections that may be made to them.[15]

14. The Special Rapporteur understands this impatience, which he knows is shared by a number of members of the Commission. Unfortunately, he can only repeat what he wrote in his fifth report:[16] he takes his share of responsibility for the delay in the preparation of the Guide to Practice; in his "defence", he would note that he received no assistance other than what the Commission secretariat was able to provide (assistance which he wholeheartedly welcomed), that he would not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

15. During the debate many delegations also made very useful comments and suggestions regarding the draft guidelines already adopted by the Commission.[17] While endeavouring to keep these remarks in mind for the remainder of his study, the Special Rapporteur nonetheless believes that these comments can only be taken fully into consideration when the Commission takes up the consideration of the Guide to Practice on second reading; otherwise, his work would be a truly Herculean effort.[18]

16. The situation is different with regard to the comments of States concerning the draft guidelines submitted by the Special Rapporteur in his fifth report, which the Commission has not yet had the opportunity to consider. Likewise, it would be useful for the Commission to be informed of the valuable observations transmitted to him by the United Kingdom on 21 February 2001, for which he especially wishes to thank that country.

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[12] A/CN.4/513, para. 283.

[13] See, in particular, the statements by Chile (A/C.6/55/SR.17, para. 59), Austria (A/C.6/55/SR.22, para. 1), Brazil, on behalf of the Rio Group (A/C.6/55/SR.23, para. 7), France (A/C.6/55/SR.22, para. 14), the United Kingdom and the Russian Federation (A/C.6/55/SR.23, para. 64).

[14] Cf. the statements by Germany (A/C.6/55/SR.21, paras. 59 and 60), Sweden, on behalf of the Nordic countries (A/C.6/55/SR.21, para. 107), Mexico (A/C.6/55/SR.23, para. 18) or Greece (A/C.6/55/SR.24, para. 46); against: Bahrain (A/C.6/55/SR.23, para. 24) and Japan (A/C.6/55/SR.25, para. 85).

[15] See A/CN.4/513, para. 288.

[16] A/CN.4/508, note 92.

[17] A/CN.4/513, paras. 291-312.

[18] The Special Rapporteur does not, however, consider it necessary to defer his reply to a question raised somewhat insistently by the representative of Greece at the 24th meeting on 16 November 2000, concerning the nature of declarations made by States under article 124 of the Rome Statute of the International Criminal Court (A/C.6/55/SR.24, para. 45); see also the comments by the representative of Austria (A/C.6/55/SR.22, para. 2). In his view, there is no doubt that such statements are akin to genuine reservations provided for in the treaty (see A/CN.4/508/Add.1, paras. 148-167); see also Alain Pellet, "Entry into Force and Amendments" in: A. Cassese, ed., *The Rome Statute of the International Court — A Commentary* (Oxford University Press, 2001) (in publication).

17. Essentially, these comments pertain to the following draft guidelines:

- 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), which, it was suggested, could be combined;[19] moreover, the United Kingdom fears that the inclusion of guideline 2.2.2 would enshrine a practice that has no legal basis;

- 2.2.4 (Reservations formulated when signing for which the treaty makes express provision),[20] about which the question was asked whether it was not the expression of a *lex specialis*, which is always possible;[21] and

- 2.3.1 (Late reservations).[22]

18. With regard to this latter draft, a fair number of speakers expressed agreement with the Special Rapporteur[23] and dwelt on the need to limit the practice of late reservations.[24] Moreover, during the consideration of draft guideline 2.3.1, several delegations expressed a positive assessment of the decision by the Secretary-General to extend to 12 months the period during which States can react to late reservations.[25]

19. Moreover, several States took the opportunity afforded by this debate to express their views on the rules applicable to amendments to reservations.[26] The Special Rapporteur took these remarks into consideration in the drafting of this report.

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[19] Cf. the comments by Austria (A/C.6/55/SR.22, para. 3); Hungary stated that it fully endorsed the text of draft guideline 2.2.2 (A/C.6/55/SR.22, para. 40).

[20] Moreover, the United Kingdom suggests amendments to the wording of draft guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form][a treaty that enters into force solely by being signed]).

[21] Cf. the comments by Austria (A/C.6/55/SR.21, para. 3); see also the drafting amendment suggested by the United Kingdom; Romania in particular welcomed draft guideline 2.2.4 (A/C.6/55/SR.23, para. 77).

[22] The Netherlands, sceptical of the very notion of "conditional interpretative declarations", also expressed doubts regarding the validity of draft guidelines 2.4.4, 2.4.5 and 2.4.6 (A/C.6/55/SR.24, para. 6). See also the comments by the United Kingdom on draft guidelines 2.3.2 to 2.3.3 and 2.4.3 to 2.4.8 (the latter were deemed unnecessary).

[23] Cf. A/CN.4/508/Add.3, paras. 305-306, and A/CN.4/508/Add.4, para. 311.

[24] See, in particular, the statements by South Africa (A/C.6/55/SR.15, para. 73), Chile (A/C.6/55/SR.17, para. 60), Austria (A/C.6/55/SR.21, para. 4), Germany (A/C.6/55/SR.21, para. 61), Spain (A/C.6/55/SR.21, para. 81), Sweden, on behalf of the Nordic countries (A/C.6/55/SR.21, para. 108), France (A/C.6/55/SR.22, para. 21), Romania (A/C.6/55/SR.23, para. 77), Brazil (A/C.6/55/SR.24, para. 17) and Portugal (A/C.6/55/SR.24, para. 27); Mexico and the Netherlands both have doubts as to the appropriateness of this draft guideline (cf. A/C.6/55/SR.23, para. 16 and A/C.6/55/SR.34, para. 7); see also the written observations of the United Kingdom, which also proposes some drafting amendments.

[25] See the comments by Germany (A/C.6/55/SR.21, para. 62), Spain (A/C.6/55/SR.21, para. 82), Sweden, on behalf of the Nordic countries (A/C.6/55/SR.21, para. 109), Italy (A/C.6/55/SR.23, para. 36), Romania (A/C.6/55/SR.23, para. 77) and Brazil (A/C.6/55/SR.24, para. 17).

[26] Cf. the statements by Germany (A/C.6/55/SR.21, paras. 65-67), Spain (A/C.6/55/SR.21, para. 82), the Netherlands (A/C.6/55/SR.24, para. 8) and Portugal (A/C.6/55/SR.24, para. 27).

B. Recent developments with regard to reservations to treaties

20. The fifth report sought to give an account of action by other bodies with regard to reservations to treaties.[27] The Special Rapporteur provided additional information during the oral presentation of his report to the 2630th meeting of the Commission[28] with regard to the decision of 2 November 1999 of the Human Rights Committee in the *Rawle Kennedy* case (Trinidad and Tobago)[29] and the working paper prepared by Ms. Françoise Hampson pursuant to decision 1998/113 of the Subcommission on the Promotion and Protection of Human Rights.[30]

21. On 26 August 1999 the Subcommission took note of this working paper, endorsed the conclusions contained therein and decided to appoint Ms. Hampson as Special Rapporteur "with the task of preparing a comprehensive study on reservations to human rights treaties".[31] Nevertheless, "in view of the fact that the Commission on Human Rights at its fifty-sixth session decided to request the Subcommission to request Ms. Hampson to submit to the Subcommission revised terms of reference for her proposed study further clarifying how this study would complement work already under way on reservations to human rights treaties, in particular by the International Law Commission (decision 2000/108), no document has been prepared by Ms. Hampson" for the fifty-second session of the Subcommission in August 2000.[32]

22. In the light of this request, the Subcommission, in its resolution 2000/26 of 18 August 2000, renewed its 1999 decision, stipulating that Ms. Hampson's study "will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper"; accordingly, the Subcommission requested the Special Rapporteur [Ms. Hampson] to submit "a preliminary report to the Subcommission at its fifty-third session [2001], a progress report at its fifty-fourth session [2002] and a final report at its fifty-fifth session [2003]".[33]

23. In this same resolution, the Subcommission

> "*Requests* the Special Rapporteur to seek the advice and cooperation of the Special Rapporteur of the International Law Commission and of all relevant treaty bodies and, to that end, requests the authorization of a meeting between the Special Rapporteur of the Subcommission, the Special Rapporteur of the International Law Commission and the Chairpersons of the relevant treaty bodies or their nominees, when both the International Law Commission and the Subcommission are in session".[34]

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[27] A/CN.4/508, paras. 51-56.
[28] A/CN.4/SR.2630.
[29] CCPR/C/67/D/845/1999.
[30] E/CN.4/Sub.2/1999/28.
[31] Resolution 1999/27, adopted without a vote, para. 2.
[32] Resolution 2000/26, E/CN.4/Sub.2/2000/32, para. 2.
[33] Ibid., para. 3.
[34] Ibid., para. 5.

24. Even before the adoption of this resolution, the Special Rapporteur had made contact with Ms. Hampson, as the Commission had authorized him to do in the previous year. He had gathered from these informal contacts that the future report of the Special Rapporteur appointed by the Subcommission would not necessarily duplicate the work of the Commission if, as Ms. Hampson had assured him it would, her study dealt exclusively with the *practice* of reservations to human rights treaties. Quite the contrary, such a study could provide the Commission with food for thought when it returned to the study of reservations to human rights treaties in order to arrive at definitive conclusions in that regard.

25. It must be stated, however, that if the Special Rapporteur appointed by the Subcommission keeps to the agenda that she set out in the 1999 working paper[35] and that the Subcommission endorsed in its resolutions of 26 August 1999 and 18 August 2000, the study that she proposes to undertake goes well beyond a survey of the practice of States and human rights treaty monitoring bodies, and deals specifically with the regime of reservations to treaties — assuming that such a regime exists. If this proved to be the case, such a study would inevitably duplicate the work of the Commission.

26. Moreover, the Commission on Human Rights appears to share this concern; in its decision 2001/113, adopted on 25 April 2001, it again requested the Subcommission to reconsider its decision in the light of the work undertaken by the International Law Commission.

27. The Special Rapporteur cannot hide his confusion over what attitude to take. It cannot be ruled out that the Subcommission might disregard what on its face would appear to be a refusal on the part of the Commission on Human Rights, and it does not seem appropriate for the International Law Commission to intervene in the relations between those two bodies. Accordingly, if the Commission agrees, the Special Rapporteur proposes to write to Ms. Hampson to enquire about her intentions and convey to her the possible observations of the International Law Commission.

28. For its part, the Committee on the Elimination of Discrimination against Women, during its session held from 15 January to 2 February 2001, "requested the secretariat to prepare an analysis of the approach of other human rights treaty bodies to reservations to human rights treaties in the consideration of States parties' reports and communications".[36] Unless otherwise instructed by the Commission, the Special Rapporteur proposes to transmit to the Chairperson of the Committee a copy of the Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties, adopted in 1997,[37] together with relevant extracts from the report of the Commission on its forty-ninth session and his own second report.

29. Moreover, the Special Rapporteur participated, at the invitation of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, in the nineteenth meeting of that body in Strasbourg on 12 and 13

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[35] See note 30 above.

[36] See E/CN.6/2001/CRP.1.

[37] See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

September 2000. This gathering provided an opportunity for a new and fruitful exchange of views.

C. General presentation of the sixth report

30. The primary object of this report is to conclude the study of the formulation of reservations and interpretative declarations and of reactions of other contracting parties, which could not be completed last year owing to lack of time.[38]

31. This study will, as envisaged,[39] be organized in two parts: chapter II will present aspects of the formulation, modification and withdrawal of reservations and interpretative declarations that could not be addressed in the fifth report, and chapter III will deal with what might be termed the "reservations dialogue", in other words, the formulation and withdrawal of acceptances of and objections to reservations and of reactions to interpretative declarations, along with any "counter-reactions" to one or the other.

32. Once again, the Special Rapporteur wishes to note that he will confine himself strictly to the approach proposed in the "provisional general outline of the study" contained in his second report,[40] which the Commission approved.[41] In these two chapters, therefore, it is only a matter of examining *procedural* issues relating to the *formulation* of these various unilateral statements, to the exclusion of issues concerning their lawfulness.

33. Nevertheless, if time permits, the Special Rapporteur will, in chapter IV, begin the study of the effects of reservations, still in accordance with the 1996 general outline.

34. It goes without saying that the Special Rapporteur will remain faithful to the conclusions which he drew following the conclusion of the consideration by the Commission of his first report:

> "(b)[42] The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
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> "(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

[38] See paras. 4, 5 and 10 above.

[39] See the fifth report, A/CN.4/508, para. 65, and A/CN.4/508/Add.3, paras. 215-222.

[40] A/CN/4/477, para. 37.

[41] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137, and ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[42] Item (a) dealt with the change in the title of the topic, which was initially entitled "The law and practice relating to reservations to treaties".

"(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions".[43]

35. Lastly, the Special Rapporteur, mindful of the impatience aroused by the slowness of his approach,[44] will resign himself, albeit somewhat reluctantly, to going a little less deeply into the various issues raised than he endeavoured to do in his previous reports.

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[43] *Yearbook ... 1995*, vol. II (Part Two), para. 487.

[44] See para. 13 above.